FILE COPY

JUL 1

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 88

GEORGE RAMSEY, ET AL., *Petitioners,*

v.

UNITED MINE WORKERS OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
EARL C. DUDLEY, JR.
1000 Hill Building
Washington, D. C. 20006
Counsel for Respondent

Of Counsel:

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Summary of Argument	9
Argument	13
I. The National Bituminous Coal Wage Agreement, as Amended To Include the Protective Wage Clause, Does Not Constitute a Violation of the Sherman Act by the United Mine Workers	13
A. The PWC Is Not an Agreement Limiting the Union's Bargaining Power in Negotiating with Nonsignatories	14
B. The PWC Is Not an Agreement Limiting the Union's Future Bargaining Position with Respect to Signatories	17
II. The Trial Court Gave Limited and Proper Effect to the "Clear Proof" Standard for Determining Union Liability	20
A. The Formation of the Conspiracy	26
B. Post-1950 Collective Bargaining	28
C. The Southeastern Tennessee Situation	31
1. The West Kentucky Coal Company	31
2. Strikes and Violence	33
D. The Protective Wage Clause	39
E. The Overview	40

Page

III. Even If the Course of Collective Bargaining Was the Result of an Agreement, that Agreement Did Not Violate the Sherman Act 41

Conclusion 58

Appendix

15 U.S.C. § 1 59
15 U.S.C. § 2 60
29 U.S.C. § 106 60

CITATIONS

CASES:

Allen-Bradley Co. v. *Local 3, IBEW*, 325 U.S. 797 (1945) 20, 42
American Federation of Musicians v. *Carroll*, 391 U.S. 99 (1968) 47
Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) ..12, 42, 45, 46, 47, 48, 49, 56
Brotherhood of Carpenters v. *United States*, 330 U.S. 395 (1947) 25
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) . 56
Chicago Bd. of Trade v. *United States*, 246 U.S. 231 1918 ..... 49, 51
Fashion Originators' Guild v. *FTC*, 312 U.S. 457 (1941) 45
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 (1948) 5
Lewis v. *Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966); *aff'd in part*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968) 32, 41, 45
Local 24, Int'l B'hood of Teamsters v. *Oliver*, 358 U.S. 283 (1959) 47
Local 180, Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) 50
Northern Pac. Ry. v. *United States*, 356 U.S. 1 (1968) 46
Ramsey v. *UMW*, 265 F. Supp. 388 (E.D. Tenn. 1967), *aff'd by an equally divided court*, 416 F.2d 655 (6th Cir. 1969) 1, 4, 6-11, 13, 20, 21, 27-41, 45, 52, 53
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) ..47, 51
Tennessee Consolidated Coal Co. v. *UMW*, 416 F.2d 1192 (6th Cir. 1969) 11, 21, 23, 24, 25, 26

Page

UMW v. *Gibbs*, 383 U.S. 715 (1966) 11, 25, 35, 41
UMW v. *Pennington*, 381 U.S. 657 (1965) 2, 3, 9, 12, 14, 20, 29, 38, 42-47, 49, 50, 57
United States v. *Hutcheson*, 312 U.S. 219 (1940) 42
White Motor Co. v. *United States*, 372 U.S. 253 (1963) 56

STATUTES AND RULES:

15 U.S.C. § 1 (1964) 2, 13
15 U.S.C. § 2 (1964) 2, 13
15 U.S.C. § 13 (1964) 57
15 U.S.C. § 17 (1964) 49
28 U.S.C. §1254(1) (1964) 2
29 U.S.C. § 106 (1964) 2, 4, 10, 11, 20, 25, 26, 35, 39, 41
29 U.S.C. § 158(b)(5) (1964) 46
Fed. R. Civ. P., Rule 52(a) 5

MISCELLANEOUS:

Address by Milton Handler, AFL-CIO Industrial Union Dept. Lawyers' Conf., November 19, 1965, 60 L.R.R.M. 56 43

Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 Cornell L. Rev. 897 (1969) 43

Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659 (1965) ... 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

GEORGE RAMSEY, ET AL., *Petitioners,*

v.

UNITED MINE WORKERS OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions in the Court of Appeals (A. 6-50)[1] are reported at 416 F.2d 655. The opinion of the District Court (A. 61a-169a) is reported at 265 F. Supp. 388.

---

[1] Citations to the record are preceded by the letter "A." The first four volumes of the record contain the material submitted by the petitioners, and the page numbers therein are followed by the letter "a." The next three volumes, the respondent's appendix, are paginated with a following letter "b." The eighth volume, containing the proceedings in the court of appeals, is separately paginated with no suffix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1969. The petition for a writ of certiorari was filed on February 13, 1970, and was granted on March 30, 1970. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Does the National Bituminous Coal Wage Agreement, as amended to include the Protective Wage Clause, violate the Sherman Act?

2. Did the trial court properly apply the "clear proof" standard of § 6 of the Norris-La Guardia Act in finding that the UMW's collective bargaining and organizational practices since 1950 did not reflect sponsorship of a Sherman Act conspiracy?

3. Under *UMW* v. *Pennington,* 381 U.S. 657 (1965), must an alleged conspiracy between union and management be determined to have an anticompetitive effect before liability attaches under the Sherman Act?

STATUTES INVOLVED

The pertinent provisions of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964), and § 6 of the Norris-La Guardia Act, 29 U.S.C. § 106 (1964), are set forth in the Appendix to this Brief, *infra,* pp. 59-60.

STATEMENT

This case follows in the aftermath of the Court's decision in *UMW* v. *Pennington,* 381 U.S. 657 (1965). The heart of petitioners' case is the same basic charge of conspiracy: that, together with major northern coal operators, the UMW conspired to dominate and stabi-

lize the coal industry after the turbulent labor history of the 1940's. The conspiracy allegedly involved the establishment of the 1950 National Bituminous Coal Wage Agreement, the negotiation of amendatory agreements periodically in the ensuing decade, and an agreement that the union would press for uniform acceptance of these agreements, conscious that smaller companies could not live under them. More concretely, petitioners charge that the UMW "ganged up with the major companies of the country and associations representing those companies and used the repeated flat increases in amendments to the national contract, fitted to intense mechanization in thick and regular seams of coal . . . which terms became more and more impossible for the lesser companies who could not match these conditions." (Pet. Br. 7)

Although the evidence here differs in a number of respects from that in the *Pennington* case, the principal additional item of controversy is the so-called Protective Wage Clause (PWC) of the 1958 amendment.[2] Petitioners alleged that the clause formalized an agreement violative of *Pennington* in that it bound the union

---

[2] In relevant part, the PWC provides:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

(A. 1105a-06a)

to future bargaining with nonsignatory employers only on national contract terms. No judge below accepted that view of the clause. But petitioners added the theory that the PWC nonetheless violated the Sherman Act by restricting the union to national contract bargaining with those companies that had signed the national agreement but later sought modifications. Petitioners supplemented that view of the clause with the contention that the history of the UMW's activities since the 1950 agreement demonstrated a Sherman Act conspiracy to eliminate those signatory employers who could not meet the terms of the amendatory agreements.

Sitting without a jury, the trial court found no such UMW-sponsored conspiracy arising either from the terms of the PWC or from the UMW's pertinent activities since 1950. To the question of the UMW's alleged sponsorship, the court applied the requirements of "clear proof" set forth in § 6 of the Norris-La Guardia Act and found petitioners' evidence wanting. On appeal, that judgment was affirmed by an equally divided court sitting *en banc*. (A. 6-50), 416 F.2d 655 (6th Cir. 1969).

The evidence in this case was voluminous and complex, and for detailed treatment of the facts the Court is respectfully referred to the elaborate and meticulous findings of the trial court in its 52-page opinion. These findings were concurred in by the court of appeals,[3] and

---

[3] The four judges voting for affirmance expressly approved the findings of the trial court, (A. 20), 416 F.2d at 663, and the four opposing judges nowhere attacked these findings. Their quarrel with the approving judges was based exclusively on what they viewed as the trial court's erroneous reading of § 6 of the Norris-La Guardia Act, 29 U.S.C. § 106 (1964). (A. 28), 416 F.2d at 667.

thus come to this Court cloaked with the protection of the two-court rule. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1948). Petitioners have not claimed that any of these findings is "clearly erroneous" within the meaning of rule 52(a), Fed. R. Civ. P. Indeed, petitioners expressly state that they do not quarrel with the trial court's treatment of the facts. "We believe the errors below are the result of erroneous views of the law." (Pet. Br. 26) Nonetheless, the bulk of the petitioners' brief consists of a patent attempt to relitigate those facts in this Court. Here we shall confine ourselves to a brief outline of the major facts, together with a rebuttal of some of the petitioners' departures from the facts found by the courts below.

From its inception in 1890, the UMW has consistently pursued the goal of national uniformity in wages and labor standards. Petitioners' extensive attempt to argue that the policy was first adopted as a conspiratorial concession in 1950 (Pet. Br. 27-35) flies in the face of the trial court's unequivocal finding to the contrary. (A. 89a-93a), 265 F. Supp. at 404-05. There had been national collective bargaining in the coal industry for years, resulting in national contracts from 1945 on. The year 1950 is significant only in that it is the watershed between industrial warfare in the coal industry and relative stability under the aegis of the National Bituminous Coal Wage Agreement. The agreement followed upon a decade of furious instability in the coal industry highlighted by seven national strikes and five government seizures of the mines. (A. 92a), 265 F. Supp. at 405. Indeed, the 1950 negotiation itself took place under a national emergency injunction and in the wake of a presidential request for congressional legislation permitting another seizure. "In short

the 1950 Agreement was negotiated under intense national interest, intense publicity and intense supervision by and pressure from the Federal Government." (A. 95a), 265 F. Supp. at 406.

Later in 1950, after the national agreement was consummated, the Bituminous Coal Operators Association (BCOA) was formed. The Court is respectfully referred to pp. 6-8 of the Brief Amicus Curiae filed by the BCOA in this case for a full description of that organization. As the trial court's observations make clear, however, petitioners unfairly characterize BCOA as "a bargaining association that represented major companies in the northern coal fields." (Pet. Br. 10)

> At one time a total of 262 individual coal companies were included within its membership. These included the largest in the industry. They also included the smaller, for approximately one-half of the member producers produced less than 100,000 tons of coal a year. Those who stayed out did so by choice and not by reason of any exclusionary rule.

(A. 96a), 265 F. Supp. at 407. Thus BCOA imposes neither size nor geographical limitations upon membership.

Commencing in 1951, BCOA and UMW negotiated a series of new contracts, taking the form of amendments to the original Agreement (1951, 1952, 1955, 1956, 1958), each stepping up wage rates and employer contributions to the miners' welfare fund.[4] And during this period, the union offered to other bargaining units only the national contract, as amended.

---

[4] Other provisions were also contained in the amendatory agreements. For example, the PWC was added in 1958.

By contrast with the 1940's, these amendatory agreements were reached "with a minimum of publicity and without any outward signs of industrial warfare." (A. 97a), 265 F. Supp. at 407. The trial court rejected, however, the suggestion revived again here (Pet. Br. 41-44) that a two-man bargaining technique monopolized the negotiations. (A. 97a), 265 F. Supp. at 407.

Important to the background of these negotiations in the 1950's was a drastic change taking place in the position of coal relative to the fuel market. Commencing in 1940 coal gradually lost ground to other fuel sources. As the trial court observed: "whereas coal provided 47.2% of the total fuel energy consumed in the United States in 1940 . . . by 1964 coal's share had been reduced to 21.8% . . . . " (A. 100a), 265 F. Supp. at 409. Indeed, while the negotiations proceeded, "during the 1950's almost 21% of the total bituminous coal market was lost to other fuels and energy sources." (A. 101a), 265 F. Supp. at 409. Simultaneously, many sectors of the industry engaged in rapid mechanization of their coal production processes. But contrary to petitioners' charge that this mechanization was a part of a conspiracy between the union and the major producers to eliminate smaller competitors, the trial court found that "coal was forced to mechanize to survive." (A. 101a), 265 F. Supp. at 409.

The final element in the historical outline concerns the situation that developed in Southeastern Tennessee. During the 1950's, the coal industry in that section of the country continued seriously to decline. Petitioners seek to fasten antitrust responsibility for that development upon the UMW. They contend that the union, pursuant to the alleged conspiracy, sought to destroy

the viability of the local fields, thereby enabling favored coal companies to meet the coal demands of the principal local consumer, the TVA. Central to this contention is the view that the UMW conspired to impose upon the local mines the rising standards of the successive amendments to the national contract, in full awareness that these mines could not adopt the technique of mechanized mining that made the rising labor standards acceptable to competitors elsewhere.

The local coal fields in Southeastern Tennessee do suffer from certain geological disadvantages, chiefly seams of coal of uneven thickness, which make mechanization more difficult. But the trial court found that mechanization was not impossible in these mines and that many factors played a part in the decline of the local industry, including "management policies, a general undercapitalization throughout the field, the pyramiding of leases, the nature of the TVA coal market, labor practices and attitudes upon the part of the workers and collective bargaining as practiced in the field." (A. 133a), 265 F. Supp. at 424.

Moreover, the trial court rejected two other major allegations regarding the Southeastern Tennessee situation, which are reasserted here (Pet. Br. 50-68) in support of the theory of a predatory conspiracy. As the court acknowledged, the Southeastern Tennessee fields have been plagued with strikes marked by bloody violence, particularly since 1960. But the court found that the record did not reflect the requisite evidentiary support for a finding that the union was responsible for the violence. (A. 143a-45a), 265 F. Supp. at 428-29. Moreover, it also found the petitioners had not adequately demonstrated that the strike itself was part of any conspiratorial arrangement. (A. 145a-47a), 265

F. Supp. at 429-30. Likewise, the court rejected petitioners' allegations (Pet. Br. 54-55) that the UMW invested in certain coal companies, principally West Kentucky Coal Company and its subsidiary, Nashville Coal Company, to engage in predatory pricing to drive the small companies out of business. After an elaborate review of the evidence the trial court concluded that there was no need to examine the UMW's relationships with these coal companies in any detail, since petitioners had utterly failed to make out their allegation that predatory pricing took place. (A. 117a-30a), 265 F. Supp. at 416-23.

Thus, at every point the major factual allegations upon which petitioners' case is predicated were squarely rejected. Petitioners cannot now resurrect their case by arguing in this Court the factual contentions which they failed to sustain below.

SUMMARY OF ARGUMENT

I

The National Bituminous Coal Wage Agreement, as amended to include the Protective Wage Clause (PWC), does not constitute an agreement in violation of the antitrust laws. The language of the PWC will not bear either reading relied upon as part of petitioners' antitrust claim: (1) that, in violation of *UMW* v. *Pennington,* 381 U.S. 657 (1965), the PWC commits the union to offer only the national contract to employers who have not signed the Agreement; or (2) that the PWC likewise freezes the union's bargaining position when employers who have signed seek modifications upon expiration or termination of the period of the contract.

The Protective Wage Clause does no more than guarantee during the period of the contract, that the terms of the labor-management Agreement will be enforced uniformly with respect to all signatories. In multi-employer bargaining, such a clause makes eminent sense, for there is the possibility that a union will reach implicit or explicit side agreements relieving certain employers from particular burdens, thereby conferring discriminatory competitive advantage on the favored few.

II

Taken together with the national Agreement, as amended, the evidence of UMW's conduct does not manifest a union-management conspiracy in violation of the antitrust laws.

In an exhaustive 52-page opinion, the trial court examined the evidence in detail and rejected petitioners' conspiracy theory. Contrary to petitioners' view, the court properly applied the "clear proof" requirement of § 6 of the Norris-La Guardia Act, 29 U.S.C. § 106 (1964), in assessing the weight of the evidence. The trial court did not view that standard as requiring that "all elements of a cause of action for antitrust violation must be made out by 'clear proof' where a labor union is a defendant . . . ." (A. 28), 416 F.2d at 667. Instead, the court properly limited § 6, in accord with its language and the intent of Congress, to questions pertaining to the UMW's activities as an "organization" that reflect upon its "participation," "authorization," or "ratification" of those acts alleged as evidence of the conspiracy.

The trial court's opinion itself manifests the meticulously limited application of the "clear proof" stand-

ard. For example, adhering to this Court's decision in *UMW* v. *Gibbs,* 383 U.S. 715 (1966), the court examined the allegation that strike violence was evidence of the conspiracy by applying the "clear proof" rule only to the question whether the UMW had authorized, ratified, or was otherwise responsible for the violence that occurred locally.

Any doubt arising from the opinion, however, should be resolved to conclude that the court properly applied § 6. For in a contemporary companion case, tried on virtually the same evidence, but to a jury, the same trial judge articulated jury instructions that were unmistakably properly confined. See *Tennessee Consolidated Coal Co.* v. *UMW,* 416 F.2d 1192, 1201-03 (6th Cir. 1969).

For the most part, however, the trial court's opinion does not rest on a reading of the "clear proof" rule. With respect to virtually all of the contentions said to support the conspiracy theory, the court could not even find petitioners' case supported by a preponderance of the evidence. For example, it rejected the charge that the UMW and big companies had conspired to eliminate coal competitors in Southeastern Tennessee. But it did so because it found the evidence of conspiratorial action no weighter than the evidence that UMW had acted unilaterally. (A. 155a-56a), 265 F. Supp. at 434.

III

If, however, this Court should conclude that the trial court misapplied the "clear proof" test, it becomes relevant to reach a further question. What are the antitrust consequences if UMW's activities since 1950

have been the product of an agreement with certain coal companies? *UMW* v. *Pennington, supra,* decided that if the union did agree with management that the negotiated wages and standards would be imposed upon all other producers, the union's conduct would fall outside labor's exemption from the antitrust laws. But *Pennington* is properly read as holding no more than that; it was silent on the question whether the nonexempt conduct involved also violated the Sherman Act. Under this Court's decisions, the second question cannot be answered without an assessment of whether the allegedly violative conduct entailed "some form of restraint upon commercial competition . . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495 (1940). The *Pennington* Court made no such assessment.

In this case, there has been no finding that the course of collective bargaining in the coal industry since 1950 has entailed anticompetitive consequences of the sort condemned by the Sherman Act. The only demonstrable effect on competition has been the removal of differentials in labor standards as a mode of price competition. But this is permitted by the Clayton Act, and this "effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." *Apex Hosiery Co.* v. *Leader, supra* at 503-04. Moreover, the effect in the coal industry has been to promote competition by eliminating discriminatory differentials favoring some employers. And by permitting the radical improvement of the coal industry's efficiency, it has enabled that industry to become once again competitive in the larger market for fuel energy in this country.

Petitioners contend for a collective bargaining scheme designed solely to serve the competitive inter-

ests of the weakest units in the industry by permitting them to obtain labor contracts more favorable than those of their competitors, in order to assist them in competing. This is an obviously anticompetitive system of discrimination, which is at war with the premises of the Sherman and Clayton Acts.

ARGUMENT

I. THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT, AS AMENDED TO INCLUDE THE PROTECTIVE WAGE CLAUSE, DOES NOT CONSTITUTE A VIOLATION OF THE SHERMAN ACT BY THE UNITED MINE WORKERS

As the trial court recognized, there are two potential Sherman Act theories in this case. The National Bituminous Coal Wage Agreement itself might constitute a contract in restraint of trade within the meaning of § 1 and outside the protection of the labor antitrust exemption established by the Clayton Act. Or, if the collective bargaining agreement itself passed antitrust scrutiny, it still might have been entered into as part of a broader anticompetitive combination or conspiracy between the union and a favored group of employers.[5] (See part II *infra*)

[5] Although this case was brought under both § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1964), the text treats it exclusively as a § 1 case. The only possible theory for involving the union in an attempt to monopolize under § 2 would have to be predicated upon the assertedly predatory pricing policies of West Kentucky Coal Co., in which the union at one time owned an effective controlling interest. The trial court firmly rejected any notion that West Kentucky Coal Co. engaged in predatory pricing (A. 129a), 265 F. Supp. at 422, and this finding is not challenged. Aside from this phase of the case, the proof of a conspiracy involving the union will not differ significantly under §§ 1 and 2. Indeed, § 1 provides the easier avenue for petitioners. Since the courts below found no § 1 violation, the case may be treated here for all purposes as a § 1 case.

With respect to the theory limited to the written Agreement, two separate but related arguments have been advanced by the petitioners to bring it within the sphere of prohibited union conduct under this Court's prior decisions: (1) under *UMW* v. *Pennington,* 381 U.S. 657 (1965), the Protective Wage Clause (PWC) is offensive because it constitutes an explicit agreement between the union and signatory employers that the union will not contract with any employers, including nonsignatories, on any other terms; and (2) even if the PWC does not have this effect as to nonsignatories, it constitutes an agreement that the union will not bargain in the future with any of the *signatory* employers except on the basis of the flat national contract.

All nine judges below rejected the *Pennington* argument, for the simple reason that the PWC does not embody any such agreement as to nonsignatories. The courts below did not advert directly to the argument as limited to signatories, but it is equally clear that as to signatories, the PWC cannot be read to do what petitioners claim it does.

A. The PWC Is Not an Agreement Limiting the Union's Bargaining Power in Negotiating With Nonsignatories

The starting point for this phase of the case is the language of the Court in *UMW* v. *Pennington,* 381 U.S. 657, 665 (1965):

> . . . a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the

antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.

The Court elaborated in a footnote:

> Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy.

381 U.S. at 665 n. 2.

It is initially contended by petitioners that Paragraph A of the PWC, inserted by amendment into the National Bituminous Coal Wage Agreement in 1958, constitutes an express agreement by the union with signatory employers that the same wages and standards will be imposed upon any employers with whom the union negotiates in the future. Paragraph A of the PWC reads as follows:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those

> specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all parties signatory thereto.

(A. 1105a-06a).

Petitioners would twist the first sentence of this paragraph to say that the union has agreed to hold anyone with whom it bargains to the same terms. But the language will not bear such a reading. The union's promise not to make different agreements with individual employers is limited to such agreements "applicable to employees covered by this Contract." Thus the union is merely promising each and every member of the multi-employer bargaining unit that it will not enter into a side agreement with any one of them in denigration of the collective bargaining contract. Such a side agreement with a favored employer or group of employers who had signed the collective agreement, enabling them to utilize favorable labor standard differentials as a mode of price competition, might well itself violate the Sherman Act.[6] In any event, it is clear that there is no union promise in Paragraph A which in any way limits the union's freedom to bargain with employers who are not members of the group of signatories. The trial court adopted this construction of Paragraph A, (A. 107a), 265 F. Supp. at 412, and the four judges on the court of appeals voting for affirmance explicitly agreed, (A. 9-12), 416 F.2d at

[6] See pp. 56-57, *infra*.

659.[7] The four court of appeals judges voting for reversal did not disagree on this issue.

Nor can it be contended that the union's actual conduct in insisting upon its uniform contract in negotiations with nonsignatories supports a contrary construction of the Agreement. For as this Court recognized in *Pennington,* the union had a perfect right, at least so far as the antitrust laws are concerned, to adopt such a bargaining position unilaterally, and the trial court explicitly found that it was

> clear from the evidence that national uniformity in wage rates and labor standards in the coal industry has been a consistent policy and goal of the U.M.W. since its inception in 1890.

(A. 89a), 265 F. Supp. at 404. Thus the union's bargaining position since the adoption of the PWC is merely a continuation of the long-standing policy unilaterally adopted at its birth. It cannot support an inference that the words of the PWC mean something which they do not say—that the union is not *free* to depart from uniformity in nonsignatory bargaining.

B. The PWC Is Not an Agreement Limiting the Union's Future Bargaining Position With Respect to Signatories

Having failed in the courts below to demonstrate that the PWC violates this Court's decision in *Pennington* by binding the union to negotiate with nonsignatory employers only upon the terms of the existing Agreement, petitioners have now adopted a different tack. They now argue that *Pennington*'s view of

---

[7] See also *Lewis* v. *Pennington,* 400 F.2d 806, 814-15 (6th Cir.), *cert. denied,* 393 U.S. 983 (1968), *affirming in relevant part* 257 F. Supp. 815 (E.D. Tenn. 1966).

the Sherman Act is too narrow, and that the PWC is vulnerable as an agreement that the union will never in the future bargain with employers who are signatories except upon the terms of the Agreement. Once again the argument fails because the PWC simply does not say what petitioners claim it says.[8] Nothing in the PWC commits the union to any sort of bargaining position with anyone beyond the period during which the Agreement is in force. The first sentence of Paragraph A says that no different agreements will be made "applicable to employees covered by this Contract," *"during the period of this Contract."* Here again we have merely a promise that the union will not, while the Agreement is in force, undermine its integrity by making side agreements with one or more signatory employers which will enable some employers to utilize wage or other labor differentials as a means of price competition. Such assurances cannot possibly form the predicate of a Sherman Act charge. Arguably, as noted above, the granting of more favorable terms to any signatory or group of signatories while the contract was in force, while holding the others to the terms of the contract, would in itself violate the antitrust

[8] There is also an inherent internal contradiction in petitioners' argument. They argue as if the National Bituminous Coal Wage Agreement were a continuing, never-changing document. This is simply not the case. The Agreement is terminated periodically, at which time new agreements are negotiated. Upon termination of the Agreement, the existing contract into which petitioners claim the PWC locks them ceases to exist and is renegotiated. The fact that in most instances the basic document is carried over intact, with alterations relating principally to wages and pension fund royalties, does not mean that a clause in a contract which has been terminated has continuing effect. Moreover, the PWC itself, added by amendment in 1958, is clear evidence that basic alterations in the underlying document are open to negotiation upon the periodic termination of the Agreement.

laws.[9] In any event, assurances that the integrity of multi-employer bargaining will be maintained by the enforcement, without discrimination, favor or alteration of the contract in all its terms against all signatories while it remains in effect are central to the premises on which such bargaining is conducted.

Nothing in the PWC commits the union to bargain only upon the terms of the Agreement when a new contract is negotiated. The National Bituminous Coal Wage Agreement, when it was first executed on March 5, 1950, provided that it would terminate on June 20, 1952, and that any party could terminate it before that upon 30 days written notice on or after April 1, 1951. (A. 1071a-72a.) An amended agreement was negotiated by consent of the signatories and executed January 18, 1951, to become effective February 1, 1951. It provided that it was not subject to termination by any party prior to March 31, 1952, but that either side could terminate thereafter upon 60 days written notice. (A. 1077a.) Subsequent agreements have been negotiated for the minimum period of a year, with an option on either side to terminate at any time thereafter upon 60 days written notice. (A. 1087a, 1094a, 1102a, 1112a.) Periodically the old Agreement has been terminated and a new one negotiated. Obviously, the union's self-interest will require the periodic renegotiation of the wage scale. When the new contract is negotiated, the PWC says nothing about the terms upon which the union may bargain with anyone.

Nor can one conclude that the PWC pretermits the union's bargaining power from the circumstances that in most instances the negotiations have consisted merely of modifications of the wage scale, and that the

---

[9] See pp. 56-57, *infra*.

union has insisted each time that it would bargain only on the basis of the newly negotiated national scale. The former is the normal course of events in collective bargaining; the collective agreement forms a continuing charter which gives stability to the relationship, while periodic modifications update the wage and benefit scales and deal with problems which have arisen in the administration of the agreement. And no inference of collusion with employers, the *sine qua non* for forfeiture of the union-antitrust exemption, *UMW* v. *Pennington, supra; Allen-Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945), can be drawn from the mere adoption by the union of a uniform contract policy. It would be more than strange if the law gave the union the right to pursue uniformity provided it did so unilaterally, but then permitted an inference of non-unilateral behavior whenever it exercised that right.

II. THE TRIAL COURT GAVE LIMITED AND PROPER EFFECT TO THE "CLEAR PROOF" STANDARD FOR DETERMINING UNION LIABILITY

Respondent UMW does not contend that the enactment of the "clear proof" test in § 6 of the Norris-La Guardia Act, 29 U.S.C. § 106 (1964), reflects a congressional "intent to change legal standards governing substantive antitrust law." (Pet. Br. 74) See also (A. 28), 416 F.2d at 667. Neither does respondent contend that the rule of evidence or agency stated in § 6 requires that "*all elements* of a cause of action for antitrust violation must be made out by 'clear proof' when a labor union is a defendant . . . ." (A. 28), 416 F.2d at 667 (emphasis added). Respondent does contend, however, that under the explicit terms of § 6, a labor union "shall [not] be held responsible" for the acts alleged to constitute an antitrust violation unless

there is "clear proof" that the union "organization" actually sponsored the allegedly "unlawful acts" of individuals either by "*actual participation* in, or *actual authorization* of, such acts, or [by] *ratification* of such acts *after actual knowledge* thereof." (Emphasis added.) And the heart of respondent's position is that the trial court, sitting as the trier of fact here, meticulously confined its invocation of the higher "clear proof" standard to those issues of sponsorship specified by Congress.

In a manner of speaking, the question presented by this phase of the case concerns the "instructions" the trial judge gave to himself to guide his deliberations as trier of fact. Obviously, no set of instructions is available in a case tried to the court. Nonetheless, the "instructions" that governed Judge Wilson's factual deliberations may readily be reconstructed by this Court. The primary source material is the trial court's 52-page opinion elaborating its analysis of the *Ramsey* evidence. (A. 61a-167a), 265 F. Supp. 388. But the job of reconstruction from that opinion is assisted materially by turning first to instructions Judge Wilson actually gave to a jury in a contemporaneous companion case. In *Tennessee Consolidated Coal Co.* v. *UMW,* (E.D. Tenn. 1967), *aff'd,* 416 F.2d 1192 (6th Cir. 1969), a jury case upon the same charge of conspiracy and virtually the same evidence as the court trial in *Ramsey,* Judge Wilson set forth his view of the limits of the "clear proof" standard in unmistakably clear jury instructions.[10] See 416 F.2d at 1201-03. These instructions show that Judge Wilson confined the application of the higher standard to the

[10] These instructions were given on August 23, 1967. The opinion in *Ramsey* was filed on March 4, 1967.

single issue of the sponsorship by the union "organization" of unlawful acts.

> Now, ladies and gentlemen, *there is one issue in this case upon which the plaintiffs have a heavier burden of proof than I have just described.* That is whether the defendant actually participated in or actually authorized or actually ratified actions which violated the Sherman Act, or other Federal Antitrust Laws . . . . In this regard, you are instructed that before liability can be imposed upon a labor organization such as the defendant, Section 6 of the Norris-La Guardia Act requires that the liability of labor organizations for the acts of officers, members, agents or others, be made to appear by clear proof . . . .
>
> . . . In this case, before you can find the defendant union was a member of a conspiracy or a party to any agreement or combination to violate the Sherman Act as alleged by the plaintiff, you must find by clear proof that the union actually participated in, authorized or ratified such conspiracy, agreement or combination. In meeting the standards of clear proof, the plaintiffs are not required to satisfy the standards of proof of beyond a reasonable doubt, which is the standard of proof required in criminal cases. However, the plaintiffs may not prevail upon this issue merely by carrying the burden of proof by a preponderance of the evidence.
>
> By clear proof is meant the clear, unequivocal and convincing proof . . . .
>
> *Now, upon each and every other issue in the case, the plaintiffs are merely required to establish*

their claims by a preponderance of the evidence, and needs [*sic*] *not carry the burden of proof upon such issues by clear proof as I have defined those terms . . . .*

Now, the defendant in this case, of course, is a labor union. A union can act only through its members, agents, including its employees and officers, therefore, *in determining whether the union became a member of a conspiracy as alleged by the plaintiffs, it is necessary for you to determine whether it became a party to such conspiracy by virtue of the acts of its agents and members, and whether or not such agents and members were acting within the scope of their authority.* In other words, it must be shown to your satisfaction by clear proof that the union authorized or ratified what was done by its representatives, or acted through its authorized agents or representatives in the matters alleged. *Labor organizations are relieved, under the law from liability* for damages or imputation of guilt, or lawless acts done in labor disputes by some individual officer or agent or member of the organization, *unless there is clear proof that the organization charged* with responsibility for the offense actually participated in, gave prior authorization for or ratified such acts after actual knowledge of their perpetration.

416 F.2d at 1201-02 (emphasis added). Upon concluding his *Tennessee Consolidated* charge, and in answer to objections, Judge Wilson reiterated instructions that again clearly distinguished the single issue to which the "clear proof" standard is applicable:

You will recall that in instructing the jury with reference to the burden of proof, I instructed the

jury that the burden of proof rests in this case upon the plaintiffs and they are required to prove their claim by a preponderance of the evidence. I then proceeded to define the matter of preponderance of the evidence, and I further instruct you as follows. Now there is *one issue* in this case upon which the plaintiffs had a heavier burden than that I have described, that is, the issue of whether the defendant actually participated in or actually authorized or ratified actions which violated the Sherman Act, or the federal laws. A labor union may not be held legally responsible for or liable for unlawful acts committed by the officers, agents, or members, unless it has been shown by clear proof that the union actually participated in or actually authorized such acts, or ratified them after having actual knowledge thereof.

In this regard you were instructed that before liability can be imposed upon a labor organization such as the defendant in this case, Section 6 of the Norris-La Guardia Act requires that liability of a labor organization for acts of its officers, members, or agents must be made to appear by clear proof, before the defendant could be liable thereon. I gave you at that time further instructions as to just what was meant by clear proof, and you will bear those instructions all in mind. Then I further instructed you, *"Now upon each and every other issue in the case, the plaintiffs are merely required to establish their claims by a preponderance of the evidence and need not carry the burden upon such issue by clear proof."*

Id. at 1202-03 (emphasis added).

These "clear proof" instructions, confined to the issue of the union's responsibility as an "organization," properly carry out the limited but highly important intent of Congress in enacting § 6.[11] As this Court has observed, "the driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damages done by acts beyond their practical control."[12] *UMW* v. *Gibbs,* 383 U.S. 715, 736-37 (1966). Thus, "the purpose and effect [of § 6] was to relieve organizations, whether of labor or capital . . . from liability for damages . . . for lawless acts . . . without clear proof that the organization . . . charged with responsibility . . . actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration." *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 403 (1947); see *UMW* v. *Gibbs, supra* at 736. In a case such as this or *Tennessee Consolidated,* where the central contention is that there was a labor-management conspiracy, manifest in formal agreements and surrounding behavior, the functional meaning of § 6 is evident. The section requires, as a condition of *union* liability, "clear proof" that the union as an "organization" sponsored the conspiracy either by actual participation, actual authorization, or knowing ratification of it.

Since the *Tennessee Consolidated* jury instructions were properly limited and since they were rendered by

---

[11] The principal document in the legislative history is S. Rep. No. 163, 72d Cong., 1st Sess. 19-21. See *UMW* v. *Gibbs,* 383 U.S. 715, 736 n. 26, 743 n. 2 (1966).

[12] Section 6 also protects employers, indeed any "officer or member of any association or organization, and [any] association or organization participating or interested in a labor dispute."

the same judge virtually contemporaneously with his fact-finding opinion in this case, it defies the laws of probability to suggest that when the court sat without a jury it took any other view of the boundaries of the "clear proof" requirement. Indeed, it seems not too much to say that the *Tennessee Consolidated* instructions virtually compel an approach to the *Ramsey* opinion that resolves any doubt in favor of harmonizing it with the view of § 6 reflected in Judge Wilson's contemporaneous utterances to the jury.

Yet even without such an interpretative presumption, the *Ramsey* opinion manifests on its face a properly limited application of the "clear proof" requirement. We turn to an analysis of the opinion to show that the trial court applied the "clear proof" test in a manner fully consistent with Congress' limited but important purposes.

A. The Formation of the Conspiracy

Without any resort to a standard proof higher than ordinary preponderance, the trial court rejected petitioners' contentions concerning the formation of the alleged conspiracy. Petitioners urged that the conspiracy began with the negotiation by the UMW of the 1950 National Bituminous Coal Wage Agreement. Two major allegations put forth in support of this conclusion were: (1) that, at this time, to aid the large northern operators, the UMW surrendered traditional policies in favor of a new-found policy of national wage uniformity; and (2) that, simultaneously and for the same purpose, the UMW abandoned its three-day work week proposal.

Examining the history of pre-1950 collective bargaining as well as the 1949-50 negotiations, however,

the trial court found "no evidence" of any incipient Sherman Act conspiracy. (A. 89a-96a), 265 F. Supp. at 404-07. Quite to the contrary of petitioners' allegations, the court found it "clear from the evidence" that national uniformity in wages and labor standards had been "a consistent policy" of the UMW since 1890 and thus was not a tell-tale conspiratorial concession of the 1950 negotiations. (A. 89a), 265 F. Supp. at 404. Likewise, in answer to the contention that the three-day work week was surrendered by the union as part of the "conspiratorial" agreement of 1950, the court found "nothing in the record" to show that the three-day program was more than a relatively subordinate "bargaining technique." (A. 94a), 265 F. Supp. at 406. Finally, turning to the actual conduct of the 1949-50 negotiations, the court rejected any inference of collusion and found that "the agreement reached was the result of the most vigorous unilateral effort each party could muster." (A. 152a), 265 F. Supp. at 432. "The circumstances of the negotiations as outlined . . . give *no support* in reason to . . . a conspiratorial inference. Rather, quite to the contrary." (A. 96a), 265 F. Supp. at 407 (emphasis added).

Put in other terms, these "no evidence," "nothing in the record," "no support" findings demonstrate that the petitioners had not satisfied any conceivable standard of proof, much less a higher than ordinary one, with regard to the formation of the alleged conspiracy. Indeed, the trial court found that the record contained "clear proof" to the contrary:

> A more vigorous clash of interests or a more turbulant demonstration of what appeared to be arms' length collective bargaining has rarely been recorded in the history of labor-management rela-

tions than that which led up to the execution of the 1950 National Bituminous Coal Wage Agreement.

(A. 152a), 265 F. Supp. at 432-33.

B. Post-1950 Collective Bargaining

Turning to the second phase of petitioners' conspiracy allegations, the trial court examined the evidence pertaining to collective bargaining following 1950, and it did so again without resort to any notion of "clear proof." (A. 96a-102a, 154a-55a), 265 F. Supp. at 407-10, 433-34. In June of 1950, the BCOA was formed as a bargaining agency for the operators. The court noted that it included small as well as large operators and that any operator was free to join the Association. Only two of the alleged coconspirators were members. Focusing particularly on the negotiations leading to amendments to the basic 1950 agreement, the court observed that these discussions were notably peaceful and orderly as compared with the "turbulent 1940's." But it found that the elimination of industrial warfare was neither "suspect nor . . . an evidentiary predicate" for a finding of conspiracy. (A. 98a), 265 F. Supp. at 408.

For purposes of the "clear proof" question, it is critical to note how the court rejected the inference of conspiracy said to be reflected in the shift from war to relative peace. It did not say that the conspiratorial inference was the more likely of possible inferences yet insufficiently strong to constitute "clear proof." Instead, it rejected the conspiratorial inference because it found the contrary inference equally reasonable. In other words, since the competing inferences were equally likely, petitioners had not established the "con-

spiratorial" conclusion by evidence that would meet the ordinary preponderance test. The court observed that the shift to a peaceful pattern "might reasonably lead one to suspect that such harmony was achieved at the expense of a conspiracy directed at the smaller operators." (A. 154a), 265 F. Supp. at 433. But in evaluating the strength of the contrary inference the court found:

> Such peaceful and harmonious pattern of bargaining could *as reasonably* lead to the inference that the parties were acquiring maturity in the practice of collective bargaining and that collective bargaining was accomplishing its stated purpose of eliminating industrial warfare.

(A. 154a), 265 F. Supp. at 433 (emphasis added).

With respect to the wage scales actually negotiated, the court found them "not . . . out of line with wage increases in other basic industries." (A. 99a), 265 F. Supp. at 408. It was true, the court acknowledged, that the wage increases and other amendments to the basic 1950 Agreement were uniformly offered to all bargaining units. But the fact of uniformity alone, lawful under *Pennington* if unilaterally pursued, does not give rise to a necessary inference of conspiracy. Most important for present purposes, in rebutting the conspiratorial inference said to arise from uniformity the court did not use the "clear proof" standard. It concluded that petitioners had not buttressed that inference even to the point of a preponderance:

> An *equally reasonable inference* is that the union was but following the pattern of industry-wide bargaining established since prior to the turn of the century in electing to negotiate the agreement

> with spokesmen of the major coal producers and was but following its historical policy of national uniformity of labor standards in seeking to impose the national agreement upon all of the industry.

(A. 152a-53a), 265 F. Supp. at 433 (emphasis added).

In a closely related contention, petitioners pointed to significantly increased mechanization in the coal industry in the post-1950 era. (See also Pet. Br. 44-47). It was alleged that UMW and BCOA agreed to such mechanization, even though it would lead to unemployment, so that productivity could keep pace with the rising wage and benefit levels. The trial court acknowledged that these facts might yield an inference of "conspiratorial purpose . . . to drive from the industry those whose mines were not as suited to mechanization or whose finances would not permit the heavy capital investment incident thereto." (A. 154a), 265 F. Supp. at 433. But as to this issue the court evaluated the possible inferences as either in equipoise or preponderating in favor of non-conspiratorial explanations.

Viewing the development of competition from other fuel sources in the period from 1940, the court concluded that "coal was forced to mechanize to survive." (A. 101a), 265 F. Supp. at 409. See also charts at (A. 159a-67a), 265 F. Supp. at 435-39. Mechanization may well have been stimulated by rising wage scales, "but *at least equally* conducive to such mechanization has been the competition that coal has undergone from other fuels . . . ." (A. 100a), 265 F. Supp. at 409 (emphasis added). Rising wage scales combined with mechanization doubtless weighed heavily upon the marginal coal producer. But it does not follow that

mechanization and rising wage scales were part of a conspiratorial package.

> *Again, a more reasonable inference* would be that the wage and other benefits negotiated in the coal industry but followed the pattern set in the basic industries in the nation . . . . As for mechanization, it is *equally as reasonable* to attribute it to the competition faced by coal from other energy sources as to charge it to increased labor costs.

(A. 154a-55a), 265 F. Supp. at 433-34 (emphasis added).

C. The Southeastern Tennessee Situation

1. The West Kentucky Coal Company

A third phase of petitioners' attempt to establish the alleged conspiracy concerned the relationship between the UMW and the West Kentucky Coal Company. (See also Pet. Br. 54-55.) The heart of the charge was that by massive investments and loans to coal companies, principally West Kentucky and its subsidiary, Nashville Coal Company, the UMW obtained sufficient control over these companies to cause them, in conspiracy with other companies, to adopt predatory pricing practices.[13] The predatory pricing allegedly took place in the TVA coal market and supposedly was designed to destroy the viability of small Southeastern Tennessee producers in that market. This plan was alleged to be part of the conspiracy with the larger northern operators, and the trial court regarded the allegation as sufficient to establish the overall Sherman Act conspiracy if it were sustained by the evidence.

---

[13] The West Kentucky Coal Company is not and has never been a member of the BCOA.

(A. 109a), 265 F. Supp. at 413. The court's mode of analysis of the question is instructive. It postponed examination of the question whether UMW in fact conspired to direct or control the policies of West Kentucky and Nashville—a question to which the "clear proof" standard would have been applicable. Instead, the court turned first to a study of the pricing practices of the companies allegedly controlled. And in that regard, the court found not merely insufficient evidence of predatory pricing, but affirmative evidence to support UMW's rebuttal of the charge.

> It rather appears that West Kentucky and Nashville based their pricing upon legitimate business considerations and were attempting at all times to meet competition, rather than lead the market downward. Having so concluded, it becomes unnecessary to consider further the responsibility of U.M.W., if any, for West Kentucky and Nashville's coal pricing policies.

(A. 129a), 265 F. Supp. at 422. Although the court regarded UMW's investments as "questionable,"[14] they did not raise Sherman Act questions, for

> *the record does not support the plaintiffs'* contention that West Kentucky Coal Company, nor other coal companies charged with complicity in the conspiracy, did in fact engage in predatory pricing of coal upon the T.V.A. coal market. The down-

---

[14] In *Lewis* v. *Pennington*, 257 F. Supp. 815, 839 (E.D. Tenn. 1966), *aff'd in relevant part*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968), the retrial of *Pennington* on remand from this Court, Chief Judge Robert L. Taylor, sitting as the trier of fact, found that the loans and investments were designed for "organizational purposes."

> ward pressures of the prices, or the "price squeeze", upon the T.V.A. market may be accounted for by the competitive force generated by public bidding as well as by other policies and practices of the T.V.A. in the purchase of coal and in the integrated manner of operating its widespread system of steam generating plants drawing on many coal fields.

(A. 155a), 265 F. Supp. at 434 (emphasis added).

2. Strikes and Violence

Closely related to the predatory pricing allegation was petitioners' charge that while the UMW conspired to drive prices downward, it simultaneously sought, from the labor side, to apply the squeeze to the small Southeastern Tennessee producers by fomenting labor turmoil and violence. In evaluating that contention, the trial court undertook an elaborately detailed examination of the nature of Southeastern Tennessee field and the history of the field's relations with the UMW. (A. 130a-49a), 265 F. Supp. at 423-31.

Certain conclusions appeared unmistakably from the evidence. To survive, the Southeastern Tennessee producers had to compete effectively in the key TVA market. These producers suffered from geological conditions that impaired their competitive effectiveness considerably.[15] In fact, since 1960 coal operators in the Southeastern Tennessee fields have been unable to compete and survive in the TVA market under the National Bituminous Coal Wage Agreement. (A. 146a),

---

[15] This disadvantage, the court found, was offset in part by transportation and quality advantages that the field operators held over their principal competitors. (A. 146a), 265 F. Supp. at 430.

265 F. Supp. at 430. The evidence also disclosed strikes, picketing and other forms of labor strife that were marked at times by violence and bloodshed. (A. 133a-45a), 265 F. Supp. at 424-29.

But these facts alone, though they demonstrate petitioners' grave plight, do not suffice to fasten antitrust responsibility for the damage upon the UMW. Petitioners contended that they were indicia of the predatory conspiracy alleged. The trial court, however, rejected that view of the evidence. Once again, the court's ultimate findings were reached without resort to the "clear proof" standard. It found, as it had on other elements of the case, that petitioners had failed to establish their conclusions even by a preponderance of the evidence, since equally reasonable non-conspiratorial inferences were supported by the record. Viewing the Southeastern Tennessee evidence as a whole, the court determined:

> Finally, UMW's activities in recent years in the Southeastern Tennessee coal field *can be explained equally as well as being unilateral action* in pursuing its own interests and policies *as they can be explained by inferring that U.M.W. was acting in furtherance of a conspiracy.* That it may have acted unwisely, unreasonably, mistakenly, or even wrongfully *does not raise an inference of conspiracy that exceeds in weight or reason the inference that it acted unilaterally.*

(A. 155a-56a), 265 F. Supp. at 434 (emphasis added). In further explanation of the even balance of the evidence the court wrote:

> The evil days that have fallen upon the Southeastern Tennessee Coal field in recent years and

> the woes and misfortunes that have befallen the plaintiffs may be explained by many factors and conditions that are not demonstrative of a Sherman Act conspiracy. These include the pyramiding of leases, with the resulting increased royalty or rental payments, adverse geological conditions . . ., and under-capitalization, with the resulting attempt to mine coal by hand or other antiquated methods in an era when not only coal but all fuel and energy is produced on a mechanical and mass production basis. In this latter regard the competition of other fuels has completely altered the coal market in Tennessee, as elsewhere, since 1950.

(A. 156a), 265 F. Supp. at 434.

En route to these ultimate findings on the Southeastern Tennessee problem, the trial court examined each of the constituent elements of that situation. Its treatment of the violence element is instructive, for it is yet another illustration of the court's properly limited view of the applicability of the "clear proof" standard.

> In reviewing this evidence it must be borne in mind that the presence or absence of violence in the record is relevant *only as it may be charged to the U.M.W.*, and then only as it may bear witness to a conspiracy to monopolize the coal industry by predatory competitive means.

(A. 143a), 265 F. Supp. at 428 (emphasis added). Upon the question of the link between the UMW, as an international union, and violence as a localized phenomenon, the "clear proof" provision of § 6 of Norris-LaGuardia is directly relevant. *UMW* v. *Gibbs,* 383

U.S. 715 (1966). Accordingly, the court looked at the incidents of violence for evidence of UMW participation, authorization or ratification of the local events.

There was violence in 1960 directed toward two companies. But these incidents were involved in *Gibbs* itself, where this Court reversed a plaintiff's jury verdict for lack of "clear proof" of UMW sponsorship. And the evidence here pertaining to these incidents was "much the same" as that presented in *Gibbs*. (A. 143a), 265 F. Supp. at 429. Accordingly, it furnished no basis for attribution of responsibility to the UMW.

The other major setting of violence, however, presented a new and troubling question. These incidents took place in conjunction with a strike which began on December 26, 1962, and continued through the trial. The UMW conceded that it had sanctioned and approved the strike, though not the violence. The evidence manifested the violence beyond question, and the court also candidly concluded that although both sides had suffered, the operators and those miners who had sought to cross the picket lines had been the more significantly victimized. (A. 144a), 265 F. Supp. at 429.

Nonetheless, the court observed that "in not a single instance was an act of violence traced to an identifiable assailant." (A. 145a), 265 F. Supp. at 429. The perpetrators were never identified in the record in more than anonymous terms. And perhaps as a consequence of that failure of proof, there was no evidence of UMW sponsorship or ratification.

> The acts were those of unknown persons. Upon this record the U.M.W. could not be held chargeable for the violence, *even were the standard of proof required that of the usual civil case.* Even were members of the local unions identified as the

> perpetrators of the wrongs suffered by the plaintiffs, in the absence of proof that the U.M.W. authorized or ratified the conduct, it could not be held responsible therefor.

(A. 145a), 265 F. Supp. at 420. Thus, although responsibility for violence was an issue properly subject to the "clear proof" standard, the court found that even under the lesser preponderance test, petitioners had failed to meet their evidentiary burden.

But the trial court's inquiry did not end with that conclusion. The court recognized that even if the record did not connect the violence with the UMW, the strike and the picketing, both concededly ratified by the UMW, might yet yield an inference that it was the purpose of the UMW to conspire to impose the national Agreement upon the Southeastern Tennessee coal field. The record was utterly barren of any direct evidence of such a conspiracy. (A. 146a), 265 F. Supp. at 430. And "upon review of the evidence as it relates to the Southeastern Tennessee coal field *and of the U.M.W.'s activities therein,*" (A. 146a), 265 F. Supp. at 430 (emphasis added), the court was unable to find inferential support amounting to "clear proof" that the UMW had participated in, authorized, or ratified any such predatory plan. Petitioners relied heavily upon the UMW's advocacy of mechanization as "proof demonstrating a conspiracy, in that the U.M.W. was in fact attempting to force mechanization upon a coal field which it knew to be unsuited by geology therefor and at a rate that the U.M.W. knew was impossible for all but the largest coal operators in the nation." (A. 147a), 265 F. Supp. at 430. But the record affirmatively rebutted the underpinnings of that theory. The court found that mechanization was *not* beyond the

economic capacity of all but the larger operators, and that, in fact, even in the Southeastern Tennessee fields, incipient efforts at mechanization had been "well on the way toward raising productivity to competitive levels" when organizational and seniority problems impaired progress.[16] (A. 147a), 265 F. Supp. at 430.

Accordingly, "clear proof" was lacking "that the U.M.W. acted other than unilaterally in furtherance of its own interests and purposes in its activities in the Southeastern Tennessee coal field in the period here under review." (A. 147a), 265 F. Supp. at 430. Since this amounted to a determination with respect to alleged UMW membership in a conspiracy, the "clear proof" standard was properly applicable. But it is noteworthy that upon the court's review of the elements individually—violence, picketing, and mechanization—it was also true that petitioners had failed to establish the conspiracy theory even by an evidentiary preponderance.

The court thereby concluded, in full accord with this court's decision in *Pennington,* 381 U.S. at 665 n. 2, as follows:

> So long as it acted unilaterally, and not in conspiracy with other coal producers, the U.M.W.'s efforts to achieve national wage uniformity could not be accused of having an antitrust taint. Under such circumstances, the U.M.W. could not be required, as a means of escaping antitrust liability,

[16] The record does not disclose that these organizational and seniority problems were other than legitimate union grievances. They resulted from efforts by Tennessee Consolidated, a major local operator, to form wholly-owned subsidiaries that would work without a UMW contract and circumvent existing seniority claims. (A. 139a-40a), 265 F. Supp. at 427.

> to bargain for labor standards, wages or working conditions that would improve the plaintiffs' competitive position by the reduction of wages or labor standards, by gearing wages to the status of mechanization or its lack, or by tying wages to productivity.

(A. 149a), 265 F. Supp. at 431.

D. The Protective Wage Clause

The final element of petitioners' case to which the trial court applied the "clear proof" standard likewise concerns UMW's membership in an alleged conspiracy. Petitioners contended that the so-called Protective Wage Clause of the 1958 amendment to the national Agreement constituted a formalization of the hitherto tacit conspiratorial agreement. Paragraph A of the PWC, it was alleged, stated an agreement by UMW not to enter a contract with any other bargaining unit upon any terms other than those imposed on signatories by the national Agreement. The trial court rejected that reading of the express terms of the clause in favor of the view that the clause did no more than bind the union to adhere to the terms of the national Agreement with all parties who had signed it. (A. 107a), 265 F. Supp. at 412). Four judges of the court of appeals joined in that reading of the clause. (A. 11-12), 416 F. 2d at 659. The remaining four did not state a contrary view.

The trial court applied the "clear proof" standard, however, not to the question of whether an agreement concerning nonsignatories was expressed in the clause but to the issue of whether such an agreement had been impliedly reached. Upon that question, as upon the issue of local violence, § 6 of the Norris-LaGuardia Act

plainly requires "clear proof," for an implied agreement tacitly reached by the agents negotiating for the UMW cannot be held the agreement of the UMW unless it was authorized or ratified by the UMW as an "organization."[17] Put somewhat metaphorically, in the absence of "clear proof" of "organization" sponsorship, the acts of agents that do violence to the antitrust laws, no less than other acts of violence, cannot form the basis of union liability. Accordingly, since the trial court found less than "clear proof" of an implied side agreement, it properly concluded that the record did not support a finding that the UMW's efforts at national uniformity were pursued other than unilaterally. (A. 108a), 265 F. Supp. at 412.

E. The Overview

Having reviewed each of petitioners' constituent allegations separately, the trial court concluded its analysis with "an evaluation of the full record . . . viewed as a whole . . . ." (A. 149a), 265 F. Supp. at 431. Upon a review of "the panorama," (A. 149a), 265 F. Supp. at 431, the court was unable to find a UMW-sponsored conspiracy.

> While many inferences favorable to the plaintiffs' contentions can reasonably be drawn from the evidence, *in every instance a no less equally reasonable inference can be drawn to the contrary.*

(A. 151a-152a), 265 F. Supp. at 432 (emphasis added).

In sum, the trial court found that when the evidence was viewed as a whole, it weighed no more favorably

---

[17] The ratification procedure of the UMW is set out at (A. 87a-88a), 265 F. Supp. at 403.

to the petitioners than to the UMW.[18] Even under the preponderance standard, petitioners had failed to meet their burden. The trial court's properly limited view of the role of "clear proof" was then reflected in its comment that "did not the clear evidence rule apply, the Court might have reached a different conclusion *upon certain issues.*" (A. 157a), 265 F. Supp. at 434 (emphasis added). With respect to such issues as the attribution of local violence and the responsibility of the "organization" for any tacit side agreements, the lesser standard of proof "might" have dictated intermediate inferences different from those drawn by the court. Likewise, with respect to the view taken of the of the evidence as a whole, the UMW's membership in any conspiracy "might" have been regarded otherwise under a lesser standard of proof. But § 6 of Norris-LaGuardia was enacted precisely to avoid such easy attribution of illegality to an international union under circumstances beyond its "practical control." *UMW* v. *Gibbs,* 383 U.S. 715, 737 (1966). The important functional meaning of that enactment was given properly limited, but fully effective, scope in the evaluation of the evidence in this case.

III. EVEN IF THE COURSE OF COLLECTIVE BARGAINING WAS THE RESULT OF AN AGREEMENT, THAT AGREEMENT DID NOT VIOLATE THE SHERMAN ACT

Respondents contend that the Court's inquiry should end at this point. The National Bituminous Coal Wage Agreement does not violate the Sherman Act, and the court below properly applied the law in finding that

---

[18] This result accorded fully with that reached by Judge Taylor, sitting as the trier of fact in *Lewis* v. *Pennington,* 257 F. Supp. 815, 864 (E.D. Tenn. 1966), *aff'd on this issue,* 400 F.2d 806, 815 (6th Cir.), *cert. denied,* 393 U.S. 983 (1968), which was tried upon the same allegations and virtually the same evidence as this case.

there had been no showing of any additional agreement between the union and the major producers to impose the national contract upon all units of the industry. Thus none of the consequences of which petitioners complain has been shown to be the result of concerted action between a labor and a nonlabor group, and the union remains within the scope of the exemption delineated in *UMW* v. *Pennington*, 381 U.S. 657 (1965), and *Allen-Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945). Nonetheless, should the Court conclude that the failure of the trial court to find an operative agreement might have been the result of an improper reading of the Norris-LaGuardia Act, it would become relevant to consider the validity of the course of collective bargaining in the coal industry since 1950 on the assumption that it was the product of some such agreement.

Such an inquiry is predicated on a vital distinction. As this Court has held, "activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 512 (1940). In *UMW* v. *Pennington*, 381 U.S. 657, 665 (1965), the Court held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." See also *Allen-Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945); *United States* v. *Hutcheson*, 312 U.S. 219 (1940). Although it was tried on different evidence, *Pennington* involved essentially the same allegations of conspiracy as this case. Thus if the union agreed with some coal producers that the wages and working standards negotiated with them would become the national standards imposed on all other producers, the union's conduct

would fall outside the exemption established by the confluence of the Clayton and Norris-LaGuardia Acts.

This conclusion does not provide a necessary answer to the second question—whether the conduct violated the Sherman Act—and we do not read *Pennington* to foreclose this inquiry. We read *Pennington* as a case concerned exclusively with the scope of the union exemption, leaving open to decision in each case the question of substantive Sherman Act liability.[19] The sole question presented in this area by *Pennington* was "whether in the circumstances of this case the union is exempt from liability under the antitrust laws." 381 U.S. at 661. The union had moved in the trial court for a directed verdict and for a judgment notwithstanding the verdict, claiming that the actions alleged and sought to be proved were within the scope of the exemption. The Court found that the answer to the question posed by the record in *Pennington* was "clearly in the negative and that the union's motions were correctly denied." *Id.* After reviewing the historical development and scope of the labor exemption, the Court stated its holding:

> Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, *was not exempt from the antitrust laws.*

Id. at 669 (emphasis added).

---

[19] See Address by Milton Handler, AFL-CIO Industrial Union Dept. Lawyers' Conf., November 19, 1965, 60 L.R.R.M. 56, 61-64; Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 Cornell L. Rev. 897, 911-12 (1969); *cf.* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 720 (1965).

Thus the Court did not purport to address itself in *Pennington* to any issue regarding liability under the antitrust laws, and it should not be read to have decided any such issue. It must be conceded, however, that there is language in the opinion of the Court in *Pennington* which is susceptible of a different reading. *Pennington* might be read to say that all "agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit" violate the Sherman Act "*without regard to predatory intention or effect in a particular case.*" 381 U.S. at 668 (emphasis added). There are a number of persuasive reasons for reading *Pennington* to say no such thing. Not only would such a Sherman Act ruling be pure dictum in light of the narrow and carefully circumscribed question which the Court said was presented by the record, but it seems clear that such a reading of the Sherman Act did not command a majority of the Court. Mr. Justice Douglas, joined by Justices Black and Clark, without whose votes the opinion of Mr. Justice White would not have been an opinion of the Court, added a brief concurrence in which he noted that as he read the Court's opinion:

> On the new trial the jury should be instructed that if there were an industrywide collective bargaining agreement whereby employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that *if it was made for the purpose of forcing some employers out of business,* the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.

Id. at 672-73 (emphasis added). Such a deliberately predatory scheme would clearly fall within the traditional ambit of the Sherman Act, *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941), but this reading of the Act in no way imports a *per se* rule against all agreements concerning labor standards outside the bargaining unit.[20]

Even more important, a *per se* reading of *Pennington* would render that case a significant departure from this Court's prior decisions both within and without the labor-antitrust field. It would amount, in effect, to an overruling of Mr. Justice Stone's seminal and meticulous decision in *Apex Hosiery,* with absolutely no indication that the Court in *Pennington* intended any such revolutionary result. The central premise of *Apex Hosiery* is that unions will not be subjected to the drastic criminal and civil penalties of the Sherman Act unless their conduct does violence to the antitrust laws' concern for the preservation of commercial competition. "[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services . . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495 (1940).

---

[20] Both the trial court and the court of appeals in this case and in the *Pennington* case following remand by this Court read the combined effect of the Douglas and White opinions to be a requirement of predatory intent. See *Ramsey* v. *UMW*, 416 F.2d 655, 661 (6th Cir. 1969), *affirming* 265 F. Supp. 388, 399 (E.D. Tenn. 1967); *Lewis* v. *Pennington,* 400 F.2d 806, 814 (6th Cir.), *cert. denied,* 393 U.S. 983 (1968), *affirming on this point* 257 F. Supp. 815, 829 (E.D. Tenn. 1966).

The Court made no finding about effect on competition in *Pennington*. Indeed, its concern with the preservation of the union's "freedom of action with respect to its bargaining policy," 381 U.S. at 668, seems more appropriate for resolution under the labor laws than the antitrust laws. The Sherman Act is not a statute about union bargaining policy or "freedom of action" in the abstract. It is a statute about undue restraints upon competition. The very concept of bargaining collectively toward an agreement to formalize the labor relations of one or more employers, and perhaps an entire industry, implies a judgment on the part of the union about when and to what extent that freedom of action should be curtailed in the interests of the members. The question might well be asked whether a union which had agreed with one group of employers to seek specified agreements from another group was in a position to fulfill its duty to bargain in good faith with the latter group, imposed by § 8(b)(5) of the Taft-Hartley Act, 29 U.S.C. § 158(b)(5) (1964). But the question whether all such agreements necessarily violate the Sherman Act is a very different one, which cannot be assessed without some further inquiry into the effect such classes of agreements have on competition. *Apex Hosiery* v. *Leader, supra.*

This Court has concluded under the Sherman Act that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 5 (1958). This certainly cannot be said, however, of all "agreements

between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit," at least not without elaboration of the reasons why such agreements inevitably entail unredeemed pernicious effects, not upon union "freedom of action," but upon "commercial competition in the marketing of goods and services"—an inquiry which the Court did not undertake in *Pennington.* Absent a rule of *per se* illegality rooted in the policy of the Sherman Act to promote competition, the "rule of reason," *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911), demands precisely the inquiry into the "effect in a particular case" of the agreement complained of which the Court failed to make in *Pennington.*

Moreover, in assessing the effect upon competition of union activities challenged under the Sherman Act, the Court has since *Apex Hosiery* been sensitive to the peculiar considerations which the union's collective bargaining role injects into traditional antitrust analysis. The irreducible minimum of the Court's promise in *Apex Hosiery* is that a union will not be punished under the antitrust laws unless it engages in concerted action which entails consequences that would subject a combination of businessmen to Sherman Act liability. But more than that, the Court has in such cases as *Local 24, Int'l B'hood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), and *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968), approved of labor-management agreements which would be *per se* illegal if entered into by businessmen, on the ground that the union's legitimate interest in protecting the wages of its members justified certain rather severe restraints upon competition. *Oliver* involved a contract between the Teamsters and a group of carriers setting the

rentals which the carriers were required to pay to non-union owner-drivers of trucks which they occasionally rented to supplement their fleets. It was, in short, a a price-fixing arrangement, which prevented the owner-drivers from competing with each other and with union drivers by lowering the price of their services, and if entered into by the signatory carriers without the union it would have been *per se* illegal. But the Court approved the agreement because "its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." 358 U.S. at 293-94. It found that "the point of the [agreement] is obviously not price fixing but wages." *Id.* at 294. It constituted "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." *Id.*

Even more to the point, *Apex Hosiery* recognized that union activity directed to the end of standardizing wages throughout an industry was permissible, not because it was exempted from antitrust liability by the labor laws, but because it did not restrain competition in violation of the Sherman Act:

> A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." . . .
>
> . . . Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price

> competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective, it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

310 U.S. at 503-04.

The strange results which would flow from reading *Pennington* to establish a *per se* rule of antitrust liability without regard to the effect of any given arrangement on competition may be seen in the context of this case. The union is alleged to have agreed with one group of employers to demand the same wages of all employers. The obvious effect of such an agreement is the "elimination of price competition based on differences in labor standards." It does not follow that this can be said to restrain competition in coal; on the contrary, it opens the coal market to the operation of the natural forces of competition, since it merely eliminates a system of patchwork labor differentials which created competitive discrimination in favor of some employers. See *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The only "line of commerce" in which it could conceivably restrain competition is the labor of the mine workers. But that is permissible because "the labor of a human being is not a commodity or article of commerce." Clayton Act, § 6, 15 U.S.C. § 17 (1964). In any event, *Apex Hosiery* tells us that such a result is not the sort of restraint upon competition at which the Sherman Act is aimed.

Moreover, *Pennington* itself recognized that unilateral union insistence on uniform wages and working conditions was legitimate exempted activity. The upshot is that union conduct which (a) is exempt if undertaken unilaterally, and (b) does not entail the sort of anticompetitive consequences which the Sherman Act proscribes, becomes *per se* illegal if it involves an agreement between a union and an employer.

The difficulties of the *per se* reading of *Pennington* are multiplied when it is recognized that "the impact of the wage agreement reached with a particular employer or a group of employers upon competing employers" lies at "the central core of [collective] bargaining," *Local 180, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 714 (1965) (opinion of Goldberg, J.), and that this impact will virtually always be a subject of discussion and consideration in the bargaining. Section 6 of the Norris-LaGuardia Act complicates matters even further. If the impact on competitors of a collective agreement is the subject of consideration, it will almost always be open to a judge or jury to infer by a preponderance of the evidence that the union's conduct in other bargaining units is the result of collusion. Yet § 6 requires "clear proof" of the union's participation in any such agreement, and such an inference may not be enough to satisfy that requirement. The *per se* rule might thus turn out to be unworkable in practice.

Respondents submit that a proper assessment of the alleged agreement under the antitrust laws requires an examination of the effects of collective bargaining in the coal industry upon competition in the markets for coal and fuel energy in general. They further submit that the record in this case does not support, and can-

not be read to support, a finding that the union ever entered into a deliberately predatory agreement with anyone. The most which could be inferred from the record is a tacit or implicit agreement between the union and the BCOA to bring higher wages to the miners and relative industrial stability to the strife-ridden negotiations, while promoting the competitive position of coal as a source of fuel energy, without regard to the fact that some marginal operators would inevitably be swept away by the forces of competition.

Thus, the petitioners' Sherman Act claims must rise or fall on the validity under the "rule of reason," *Standard Oil Co.* v. *United States,* 221 U.S. 1, (1911), of such an alleged agreement. As Mr. Justice Brandeis stated the rule in *Chicago Bd. of Trade* v. *United States,* 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

We think that an examination of the history of the coal industry and its labor relations during the last three decades makes it clear (1) that the course of collective bargaining in the industry promoted, and

did not restrain, competition in the market for coal and in the larger market for fuel energy as well; (2) that it was the free play of competitive forces in the drastically changing coal and fuel energy markets which put the economic squeeze on the marginal operators; and (3) that what the petitioners seek to impose on the industry is an anticompetitive collective bargaining scheme totally at war with the premises of the Sherman and Clayton Acts.

A strong case can be made that the coal industry as it existed in 1950 was a dying industry, one in which it would be most surprising if marginal operators were not driven rapidly to the wall. In 1940 coal provided 47.2 per cent of the total fuel energy consumed in the United States, as compared to 43.8 per cent for crude oil, petroleum and natural gas combined. The railroads provided a captive market for almost 20 per cent of the coal produced in the country in 1940. Industrial users of coal consumed 30.3 per cent of the 461 million tons produced in 1940. (A. 100a), 265 F. Supp. at 409.

Since that time the railroads have entered a period of precipitous decline from which they have not yet emerged, and they have converted completely to diesel fuel, so that their consumption of coal is negligible. This has been accompanied by a strong movement by industrial consumers of fuel to the cheaper and more easily handled petroleum products, and by the rise of the giant utilities as major fuel consumers. These trends were all evident by 1950. Coal production in that year was up to 516 million tons, but there was a consensus that the industry was burdened by a chronic oversupply. Coal's share of the national fuel energy market had declined well below 40 per cent by 1950,

and it fell to little more than 20 per cent by 1960. Coal production fell off to 410 million tons by 1958. Continual labor strife in the decade of the 1940's had resulted in five seizures of the mines by the Government, innumerable strikes, Taft-Hartley injunctions, and contempt citations against the union and its officers. The industry remained vital to the nation's economy, but it was in a state of sorry decline, and prospects were not bright for the future. There was not enough work to go around, and miners were idle a great deal of the time. (A. 92a-102a, charts at 159a-67a), 265 F. Supp. at 405-10, 435-39.

It was clear that for the coal industry to survive at all, it would have to find a way to compete with the cheaper petroleum fuels. The principal potential arena for this competition was the rapidly growing utilities market. For example, the TVA increased its annual coal consumption from one million tons in 1951 to 20 million tons in 1961. To compete in this market, it was absolutely essential that the efficiency of the coal industry as a whole be radically improved. In the 1940's the industry was still basically a horse-and-buggy affair, with primitive manual methods dominant even in the larger mines. Mechanization provided the only solution to the problems of the industry. As the trial court found, "it is apparent, at least in viewing the national picture, that coal was forced to mechanize to survive. The results have been dramatic." (A. 101a), 265 F. Supp. at 409. The average daily production of an American miner increased almost fourfold between 1940 and 1964, from 4.5 tons to 16.84 tons. By comparison, a Japanese miner works 18 days to produce the amount of coal produced in one day by an average American miner. (A. 101a), 265 F. Supp. at 409.

Several things should be noted at this point. Widespread mechanization of an industry to increase the productivity of its labor force will, in the absence of a market expanding as rapidly as the productivity increases, result in the constriction of the size of the labor force. Moreover, with the increase in productivity levels and the decrease in the size of the labor force, the individual laborer can legitimately demand, and the employer can afford to pay, substantially higher wages than was the case before. Mechanization is also an expensive way to increase efficiency; it takes large amounts of capital, and in all likelihood it requires an operation of a certain size before it can be made to pay for itself. The marginal coal producer was thus squeezed severely in a number of ways. (1) The price of his product was going down. (2) The cost of labor was rising steeply. (3) In many instances he could not afford the investment necessary to mechanize and thus continue competing in a more efficient economic environment. (4) This increased the pressure on him still further, since labor continued to account for a disproportionately high percentage of his production costs. (5) All this was taking place in a rapidly shifting market, which placed an extraordinary premium on increased efficiency and the ability to deliver large amounts of coal on a long-term contract with a utility consumer. One hardly need look for a conspiracy to explain the decline of the marginal coal operator.

In this economic context, the role of the union must be assessed in light of what the trial court found to be its historic unilateral policy in favor of uniform wage rates in the nationwide coal industry. There is no evidence in the record that the union's post-1950 policy was a departure from its stance in the past.

The UMW had never set its face rigidly against the mechanization which had begun in the 1940's and which resulted in a drastic reduction in the number of people employed in the coal mines during the 1950's. Presumably there is nothing in the antitrust laws or the labor laws which requires a union to resist mechanization wherever it would eliminate jobs, or promote featherbedding, particularly where to do so would have disastrous consequences for an entire industry struggling to stay alive in a market where it is beset with ever-stiffening competition from a broadening range of products. It will obviously be an agonizing decision for any union to acquiesce in industrial developments which will result in the elimination of the jobs of a majority of its members. But it is one which the union may reach under the law if it deems it to be in the best long-range interest of its members, particularly where the alternative may be the ultimate elimination of all the jobs through the slow competitive strangulation of the industry. Moreover, the union in this instance had managed to sweeten the pill as much as possible by embodying in the National Bituminous Coal Wage Agreement of 1946 the creation of the Welfare and Pension Fund to assist the forcibly retired miners.

Thus the union's collective bargaining stance regarding mechanization and other issues since the 1940's arguably saved the coal industry from competitive destruction, and the union obtained the best possible terms for its members in the process. More than that, however, the 1950 agreement and the subsequent course of collective bargaining in the coal industry have been vitally procompetitive, both within the industry and in the larger fuel energy market. The fact that some inefficient segments of the industry have found it im-

possible to survive under the intensified competitive conditions does not render the arrangement anticompetitive. The antitrust laws, as this Court has held many times, are concerned with "the protection of *competition*, not *competitors*," *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962); see, *e.g.*, *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). Competition is a process which squeezes out the marginal unit in any market if that unit is unable to provide goods or services upon terms sufficiently attractive to induce customers to purchase them. By insisting that all units in the industry organized by the UMW adopt the national standards for wages and working conditions, the UMW has done no more than eliminate differentials in labor standards as a means of price competition for favored employers. Such an "*effect on competition* has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act," *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503-04 (1940) (emphasis added), and it is not rendered any more anticompetitive when a union agrees on such a policy with a group of employers.

By contrast, the petitioners seek to impose a collective bargaining scheme on the coal industry which is designed solely to serve the competitive interests of the industry's weaker units. Petitioners' charges are lent additional color by the conspiratorial language in which they are couched, but the gravamen of their complaint remains that they are faced with a union's bargaining demand, already imposed successfully upon the bulk of the industry, which renders it difficult or impossible for them to compete. The unstated corollary is that the union has an obligation under the Sherman Act to provide competitive assistance to the weaker

units in an industry by accepting what it considers substandard wages and working conditions to allow those units to survive. This would indeed be a topsy-turvy result, for a more directly anticompetitive arrangement is difficult to imagine. An agreement between a union and an employer or group of employers that the union will charge them lower wages than it has already charged other units in the industry in order to allow the favored employers to compete on a better basis with the disfavored group is not merely the sort of direct restraint of trade at which the Sherman Act is aimed, but it also precisely parallels the discriminatory business conduct prohibited by the more specific provisions of the Robinson-Patman Act, 15 U.S.C. § 13 (1964). *Pennington* itself would condemn such an agreement. See 381 U.S. at 668.

Thus if *Pennington* is read to embody a *per se* Sherman Act rule, it places the union engaged in national bargaining on the horns of an intolerable dilemma. If it agrees on the basic contract with one group of employers and tacitly or explicitly agrees to seek to impose the same terms on others, it commits a *per se* violation of the Sherman Act. At the same time, if it concludes a basic contract with part of the indsutry, and then agrees with other units to accept lower standards in order to give them a competitive advantage, it is likewise engaged in conduct which is *per se* illegal. Read in this fashion, *Pennington* reaches both these results without any examination of the actual effect on competition, and without any recognition that national collective bargaining simply cannot as a practical matter be carried out without consideration and understanding of the overall effect of the arrangement on competition in the industry.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
STEVEN M. UMIN
EARL C. DUDLEY, JR.
1000 Hill Building
Washington, D. C. 20006
Counsel for Respondent

Of Counsel:

EDWARD L. CAREY
HARRISON COMBS
WILLARD P. OWENS
900 Fifteenth Street, N.W.
Washington, D. C.

E. H. RAYSON
Valley Fidelity Bank Building
Knoxville, Tennessee

M. E. BOIARSKY
512 Kanawha Valley Building
Charleston, West Virginia

Date: July 1, 1970

APPENDIX

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

29 U.S.C. § 106

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.